IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1918 OF 2007
IN
FIRST APPEAL NO.1076 OF 2007
IN
S.C. SUIT NO.5407 OF 2006

Smt.Shehnaz Sani. .. .. Applicant
(Org. Respondent No.1)

v/s.

1. Shri Bobby Suresh Shah .. .. Respondent
(Org. Appellant)

2. Win Cable Entertainment Pvt.Ltd. ..

3. Win Cable Data Com Pvt. Ltd. .. .. Respondents
(Org. Respondents 2 & 3)

Mr.Mihir Desai for Applicant.

Mr.Vineet B. Naik with Ms.Shruti Desai for Respondents.

Applicant present.

Respondent No.1 is present.

CORAM : SMT.ROSHAN DALVI, J.

Dated : 16th June, 2007

P.C. :

1. There was a protracted litigation between the parties from October 2006 in which certain ad-interim and interim orders came to be passed in favour of Respondent No.1 herein, who was the Plaintiff in the Suit filed by him. Thereafter in the above First Appeal came to be filed by him against the dismissal of his suit on the ground that a Memorandum of Understanding (MOU) executed by him was in effect a partnership deed which was unregistered, the Court had no pecuniary jurisdiction, and he had suppressed certain facts from the Court. The Applicant has filed this Application for dismissing the Appeal in limine with exemplary costs and in the alternative, to vacate the order of injunction dated 15.3.2007 granted in this Appeal. She has also applied for a direction against Respondent No.1 to deposit 50% amount of the Applicant's share in the business between them which is being carried on in the name of Link Vision from October 2006 and other ancillary reliefs.

2. The Applicant is Respondent No.1 in this Appeal and was

Defendant No.1 in the Suit (the Applicant). This Application is directed mainly against Respondent No.1 herein who is the Appellant in this Appeal and the Plaintiff in the Suit (the Plaintiff).

3. The Plaintiff sued for a declaration essentially upon MOU executed by and between the Plaintiff and the Applicant on 18.4.1999, seeking to enforce the said MOU and for a declaration that the Agreement entered into by the Applicant with Respondent No.2 (Defendant No.2 in the Suit) was null and void and illegal and for ancillary reliefs thereupon.

4. The Suit was filed on 2.10.2006. On 20.10.2006 the Plaintiff obtained an ad-interim order of injunction restraining the Applicant from acting upon any Agreement entered into by her with Defendant No.2 in the Suit. An Appeal from Order was filed therefrom and an application for vacating the injunction was refused. The said ad-interim injunction continued.

5. The Notice of Motion taken out in the Suit was heard and disposed off and the Suit came to be dismissed upon consideration of preliminary issues with regard to the pecuniary jurisdiction of the Court, the bar created under Section 69 of the Indian Partnership Act, 1932 in the Suit as well as upon consideration of merits and observing that the Plaintiff had suppressed material facts in the Plaint. This First Appeal is filed therefrom and is admitted. The order of injunction earlier passed has been continued in this First Appeal.

6. Pursuant to leave granted for taking out a fresh application for vacating that injunction, this Application has been taken out and has been argued on merits.

7. The aforesaid main prayer is for dismissal of the Appeal in limine and in the alternative for vacating the ad-interim relief. The Applicant has pressed both reliefs. The entire

matter has been argued on merits for considering the facts of the case as well as the question of law with regard to the bar created under Section 69 of the Partnership Act as also the valuation of the Suit for determining the pecuniary jurisdiction of the Trial Court.

8. It would be prudent to consider the facts of the case on merits first.

9. The MOU dated 18.4.1999 shows the Plaintiff as the sole proprietor who has been carrying on the business of providing satellite and cable TV services since May 1992. It shows the monetary contribution as well as construction for development and expansion of the business made by the Applicant. She is shown to be a beneficiary of 50% profits, losses, liabilities and assets of the business since 1992. The clauses in the MOU show that the Plaintiff will be responsible for technical aspects of the business and the Applicant would be responsible for the accounting aspects.

These terms are contained in Clauses 1 to 10 of the MOU. Under Clause 9 of this MOU, the parties have agreed to **equally share the profits** computed on monthly basis and arrived at between them. Clause 11 shows that neither party will be entitled to create third party rights in the business or to mortgage his **share** therein. The later clauses refer to the Agreement between the parties with regard to terminating or giving up the shares of the respective parties. These are contained in Clauses 12 to 16 of the Agreement. Under Clause 12, in case the Applicant wishes to **withdraw or resign** from the business, she would be giving up of the share in the business only to the Plaintiff. Hence, this clause is in terms of a contractual pre-emption right. Under Clause 13, the party wishing to withdraw or resign from the business is enjoined to give a notice in writing to the other party about his or her intent. The later clauses show what the parties have agreed upon such withdrawal or resignation with regard to the profits of the business.

10. It is contended on behalf of the Plaintiff that the separate partnership agreement was sought to be executed by and between the parties, for which a draft came to be prepared on 27.1.2005, but it never came to be executed by the Applicant and hence, that part remained. Consequently, the Plaintiff claims to be the sole proprietor of the business. Nevertheless, the Plaintiff admits that the Applicant did take care of the accounting aspects of the business, though as his assistant and that she was a beneficiary of 50% of the profits of the Firm.

11. The MOU, without the specific mention of the term "partnership" or "partners" does make a reference to two persons carrying on business, sharing 50% of the profits, losses, liabilities and assets and contributing to half each in the affairs of the business. It shows the capital brought in by one of the parties and the goodwill created by another by his technical expertise. It shows that each of the parties was agreed to be assigned a specific role in the business – being

technical role for the Plaintiff and the accounting role for the Applicant.

12. The Plaintiff seeks to contend that the MOU actually shows his own business and the Applicant was his assistant. That is not a part of the MOU. Such oral evidence is excluded by documentary evidence. The learned Judge has rightly interpreted the documentary evidence to consider the true intent of the parties based upon the actual sharing of the profits and the actual carrying on of the business by them, coupled with the acceptance of the fact that either of the parties could give notice to the other party of withdrawing or resigning from the business and the consequences that would follow therefrom. The notice in writing would then essentially be a notice for dissolution of the partnership between the parties.

13. A reading of the agreement, therefore, shows that not only the parties desired to form a partnership and carry on

the business of the partnership, but also that the Plaintiff seeks to challenge the action of the Applicant upon the premise that he is entitled to his rights as a parter under the MOU.

14. It has been argued on behalf of the Plaintiff that in an earlier litigation between the Applicant and one airline in the Labour Court, his evidence was led by and on behalf of the Applicant, which resulted in certain reliefs being granted in favour of the Applicant upon the premise that she was not his partner. Nevertheless, the fact remains that the parties did enter into an MOU and acted upon the MOU as if they were partners and hence, their intent is apparent thereunder, whatever may have been the reason for so drafting the document governing their business carried on by both of them.

15. The Applicant's Advocate has relied upon Section 6 of the Partnership Act, which lays down mode of determining

the existence of partnership. Under that section, determination of whether or not a group of persons is or is not a firm or partner in the firm, regard is required to be had to the real relationship between the parties as shown by all relevant facts taken together. The sharing of profit or returns of partnership or holding common interest in the partnership would not itself constitute them as partners. In this case, it is not only a sharing of the partnership, but the contribution of capital, making of the goodwill, the sharing of separate aspects of the business during the continuance of the partnership and the right to give notice in writing of the **withdrawal/resignation** from the business of the partnership and its consequences that altogether determine the real relationship between the parties as partners. For determining such real relationship, the reason why they came to execute the MOU is of no consequence under the aforesaid legal provisions. Hence, that matter is not required to be dealt with by the learned Judge. No oral evidence, as would exclude the terms and conditions contained in the

admitted written document, being the MOU dated 18.4.1999 between the parties is to be considered as it stands excluded under Section 92 of the Indian Evidence Act, 1872. These aspects would become apparent upon considering what transpired between the parties.

16. The Plaintiff sought to enforce the MOU. The Plaintiff contended that the Agreement sought to be entered into by the Applicant with Defendant No.2 was void and that she could not sell the business that he carried on as a sole proprietor to Defendant No.2 since no notice was given to him under Clause 13 of the MOU and since he had a contractual pre-emptive right under Clause 11 of the MOU. It may be mentioned that the clauses of the Agreement as a sole proprietor contradict his right of pre-emption

17. The Plaintiff obtained an ad-interim order of injunction against the Applicant based on the MOU on 20.10.2006. This order came to be passed upon hearing of the parties to

the suit, including the Applicant. The Applicant produced before the Court a writing dated 1.8.2003 in the handwriting of the Plaintiff authorising the Applicant to sell the Firm Link Vision of the Plaintiff and his 50% stake to a party whose name is illegible and that he would donate his 50% share to an organization of his choice. The writing is not happily drafted. It is scribbled in the handwriting of the Plaintiff. It is dated 1.8.2003. It is signed by the Plaintiff. It is not easily legible and decipherable. However, both their Advocates have relied upon, interpreted and argued upon the said writing. It shows an authorization for sale. It shows the Plaintiff's 50% stake. It also speaks of donating his 50% share to some organization. It has not been contended on behalf of the Plaintiff that it does not relate to the suit business.

18. At the ad-interim stage, this document was relied upon and produced by the Applicant. Its execution was denied by the Plaintiff. Upon such denial, the learned Judge hearing

the ad-interim application in the trial Court rightly concluded that, therefore, it would be a matter of evidence and could not be gone into at that stage. Consequently, he granted ad-interim reliefs. Those reliefs are continued until today.

19. In the Notice of Motion taken out between the parties, the Applicant obtained a handwriting expert's opinion. The Plaintiff has thereafter admitted the execution and justified it. It appears that there were serious disputes between the parties. It is stated to be executed under duress and coercion exercised by the Applicant upon the Plaintiff. Yet it has yet not be challenged or sought to be avoided on that ground. The fact remains that upon admission of the said writing, the Applicant's action for selling the suit business has been justified subject of course to the payment of the Plaintiff's 50% share/stake in the consideration received thereunder.

20. The Applicant has executed an Agreement and Deed of Sale dated 2.10.2006 with Respondent No.2 (Plaintiff No.2 in the Suit). Under the said instrument, the said sale is for a total consideration of Rs.Eight Lacs, to be paid as per the terms of that agreement. The terms of the agreement show that pursuant to this agreement the cable network has vested in the purchaser. The network was required to be transferred by the Applicant as the vendor to Respondent No.2 as the purchaser free of encumbrances. The transfer has not been effected. Hence, the main condition to be performed by the Applicant has remained unperformed. The consideration agreed under the said sale in the sum of Rs.Eight Lacs was to be paid in two installments by two cheques as shown in the receipt clause. The first cheque for Rs.Five Lacs was dated 2.10.2006 and the second cheque for Rs.Three Lacs was dated 31.10.2006. It is the case of the Applicant that since she has not conveyed/transferred the cable network to the purchaser, no consideration has been paid to her though the cheques were executed. It is also her

case that since the Plaintiff obtained the injunction on 20.10.2006, there was no question of realizing the second cheque.

21. On merits, the documents between the parties are seen to be admitted. No evidence in that regard is required to be taken. The execution of the MOU is admitted, though the interpretation put thereupon by the Plaintiff is not accepted by the Applicant. She contends that she is a partner as per true intent of the parties. She further contends that due to the disputes the Applicant executed the writing on 1.8.2003 and she ultimately sold off the partnership business, including the Plaintiff's share therein under the Agreement and the Sale Deed on 2.10.2006. Now, that the execution of the writing dated 1.8.2003 is also admitted. It is seen that the MOU was indeed a partnership between the parties. There was further a writing executed by the Plaintiff for authorizing the sale of his 50% share. However, under the said writing itself, she was enjoined to pay the Plaintiff his

50% share therein. The consideration under the agreement is shown to be Rs.Eight Lacs. The Applicant has not offered the Plaintiff his 50% share of Rs.Four Lacs.

22. Consequently, the Plaintiff would, therefore, not be able to restrain the Applicant by an injunction from executing the sale-deed in favour of whosoever she wanted, provided she gave him his 50% share therein which he would donate to an organization of his choice.

23. It is contended on behalf of the Applicant that even if the writing was executed, it was subject to the MOU and hence, the notice contemplated under Clause 13 of the MOU had to be given by the Applicant to the Plaintiff. That having not been given, the Applicant could not have relied upon the writing and simplicitor transferred the business under the MOU to any one. A reading of Clauses 11 to 16 of the MOU shows what the parties are required to do, if they desire to call it a day. Under these clauses of the MOU, they were not entitled to create third party interest. But if the Applicant

desired to give up her share, the Plaintiff would have a pre-emptive right. If any party desires to withdraw or resign, they would give notice in writing and pay off the amount to the other party. Upon receiving an amount, such party would cease to have interest in the business of Link Vision. The writing dated 1.8.2003 shows that whatever may have been the agreement between the parties under the MOU executed in 1999, the Plaintiff simply authorised the Applicant to sell his 50% share therein. Consequently, that writing is in the nature of a Novatio and superseded Clauses 10 to 16 of the MOU.

24. It is consequently seen that only because of the order of injunction the Applicant could not act upon the agreement and the Deed of Sale. Of course, the sale-deed is neither registered, nor adequately stamped, it being executed on a non-judicial stamp paper of Rs.500/- only. Yet the Applicant has not been able to convey and transfer the cable network to the purchaser, Defendant No.2, because of the

order of injunction. Had the injunction order not been granted, she would have entered into a separate sale-deed for conveying the cable network as per the written authorization given by the Plaintiff on 1.8.2003 to her.

25. The initial suppression, the further denial and the later justification and admission of the execution of the writing has resulted in the initial order of ad-interim injunction, which came to be continued from time to time in the trial Court as well as in the Appeal Court in this as well as earlier Appeal continuing until today. It also resulted in restraining the Applicant from transferring and conveying the cable network as per her agreement with Respondent No.2 despite the written authorization by the Plaintiff.

26. Upon seeing each of the clauses of the MOU, which the learned Judge has considered in detail, seeing its true interpretation with regard to intent of the parties, who led bare before him the facts of the case, he rightly came to the

conclusion that the MOU is, in essence, a partnership deed and consequently, requires registration.

27. Further, since the Plaintiff sued, inter alia, for declaration and injunction that the Agreement entered into by the Applicant with Respondent No.2 was illegal and sought to avoid it and applied for further injunctions, the Plaintiff became bound to pay ad-valorum court fee thereon under the provisions of Article 7 of Schedule I of the Bombay Court Fees Act, 1959. The Plaintiff's Suit was valued under the provision of Section 6 (iv)(j) of the Bombay Court Fees Act upon paying the fixed court fee. That valuation came to be rightly held by the learned Trial Judge as incorrect and improper as held in the judgment in the case of **Berner Shipping Inc. & anr. vs. Mrs.Kala Ramchandran & ors.** reported in **2002 (3) ALL MMR 3576.** Since the suit was not correctly valued, the learned Judge was not only entitled but enjoined to return the plaint to proper Court for filing after calling upon the Plaintiff to pay the requisite court

fee under the provision of Order 7 Rule 10 of the Code of Civil Procedure as also to reject the plaint under the provision of Order 7 Rule 11 of the C.P.C. if the Plaintiff failed to pay the requisite court fee. The trial Judge correctly held that he did not have the pecuniary jurisdiction. Since the Suit itself was dismissed, the order for payment of court fee is specifically not made by the learned Judge.

28. Upon the correct analysis, interpretation of the law and the documents and marshalling of the facts, the learned Judge has dismissed the Suit as not being maintainable. Consequently, the learned Judge has dismissed the Notice of Motion as well as the Suit. It is seen that the Suit is not maintainable as having been barred under Section 69 of the Partnership Act. The Court had no pecuniary jurisdiction. The Notice of Motion deserved to be dismissed on merits upon the suppression of material facts by the Plaintiff.

29. On merits, the injunction, which prevails from

20.10.2006 and which continues until today, deserves to be vacated but only upon the payment of 50% share of the Plaintiff in the consideration shown under the Agreement and Deed of Sale dated 2.10.2006 by the Applicant to the Plaintiff and further upon paying the requisite stamp duty thereon.

30. It is also seen that the Plaintiff, seeking to avoid the agreement, was actually seeking to avoid the loss caused to him by execution of the Agreement dated 2.10.2006 by the Applicant with Defendant No.2 and hence, must pay the requisite ad-valorem court fee to the extent of his 50% share in the Agreement and Deed of Sale. Hence, the following order:-

O R D E R

(i). The Applicant shall deposit Rs.Four Lacs in the trial Court within one week from today. The applicant shall also pay the requisite stamp duty on the Agreement and Deed of Sale dated 2.10.2006 within one week from today. Upon her

depositing Rs. Four Lacs, and paying the requisite stamp duty on the Agreement and Deed of Sale dated 2.10.2006, the injunction order, which is continued from 20.10.2006 till today, shall stand vacated.

(ii). The Plaintiff would be entitled to withdraw Rs.Four Lacs deposited by the Applicant pursuant to this order, constituting his 50% share in the business of Link Vision, upon valuing the Suit at the loss sought to be avoided, which is of Rs.Four Lacs.

31. The Civil Application disposed off accordingly. First Appeal is expedited. It shall be placed on board for directions after 2 weeks.

(ROSHAN DALVI, J.)